**IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL**

Court's order whether the case is or not approved fro reporting

(Chapter VIII, Rule 32(2) (b)

Description of Case

CRL Appeal No. 392 of 2003 Decided on 15-07-04

IN

Ref. No. 2 of 2003

Dungar Singh

Vs.

State of Uttaranchal

**A.F.R . (Approved for reporting)**
Not approved for reporting

Date 15-07-04 Initials of Judge

Note :- Bench Reader will attach this at the top of the first page of the judgment when it is put up before the Judge for signature.

**HIGH COURT OF UTTARANCHAL AT NAINITAL**

**Criminal Jail Appeal No. 392 of 2003**
**WITH**
**Reference No. 2 of 2003**

Dungar Singh S/o Narayan Singh
R/o Kalseema, Patwari Kshetra Chaumu
Tehsil and District Almora …….Appellant

Vs.

State of Uttaranchal …….Respondent

Sri S. P. S. Panwar learned Amicus Curiae for the appellant.
Sri G.S. Sandhu learned A.G.A. for the State.

**Coram :- Hon'ble Irshad Hussain, J.**
**Hon'ble J. C. S. Rawat, J.**

**Dated :- 15th July, 2004**

**ORAL JUDGMENT (Per :- Hon'ble Justice J. C. S. Rawat)**

The appellant-Dungar Singh was tried by the learned Sessions Judge, Almora in S.T. No. 35/2002. By judgment and order dated 22.11.2003 the appellant has been convicted and sentenced to death under section 302 I.P.C. Feeling aggrieved by the said judgment and order, the appellant has preferred this appeal from jail.

2. The learned Sessions Judge who passed the impugned judgment and order has also made a reference for confirmation of the death sentence against the appellant.

3. The brief facts leading to the prosecution are that the deceased-Smt. Bhagwati Devi was the wife of the appellant-Dungar Singh and they were living together in village Kalseema. They had four children namely, Bhim Singh, Km. Manju, Arjun Singh and Km. Deepa aged about 11, 8, 6 and 4 years respectively at the time of the incident. On 16.4.2002 at about 3 PM, when the deceased was cleaning the utensils at her house and the children were also there, the appellant came from the village in drunken

state. He started beating his wife-deceased by a wooden stick resulting which the deceased sustained injuries. Thereafter, the appellant left the house and went to village. The appellant again returned to his house between 8 to 9 PM in drunken state and started beating the deceased by *Chauka* and then strangulated her by *Sanasi.* Consequently, she died. The accused then put her on the bed and asked his children to go to sleep. After some time the appellant poured the kerosene oil on the deceased and set her to fire. After doing so, the appellant has raised the alarm to show that it was a case of suicide. The alarm raised by the appellant attracted the villagers Pratap Singh, Sher Singh, Rajendra Singh etc. They extinguished the fire by throwing water on the dead body of the deceased.

4. Bhim Singh – the son of the appellant informed the Gram Pradhan-Bachi Singh, who on 17.4.2002 at about 10 AM informed the Patti Patwari by his written report (Ex.Ka-1). On the basis of the written report, Patwari lodged the FIR (Ex.Ka-6) and registered a case against the appellant under section 302 I.P.C. at about 10:00 AM the same day. The statement of Bachi Singh-informant was recorded and thereafter Patti Patwari reached at the spot where the dead body was taken in possession. He prepared Panchayat Nama (Ex.Ka-4), site plan (Ex. Ka-7), arrest memo (Ex.Ka-2) and recovery memo (Ex.Ka-3). One wooden *Chauka* and one iron *Sanasi* were taken into possession by the I.O. He also prepared the necessary papers like 'Photo lash', Challan & letter to CMO (Ex.Ka-8) and sent the dead body for postmortem to the mortuary. The other part of the investigation was taken up as usual which culminated into the submission of the chargesheet against the accused-appellant under section 302.

5. The accused-appellant was charged under Section 302 IPC. The accused denied the charge and claimed the trial.

6. At the trial, the prosecution examined four witnesses namely, informant – Bachi Singh (PW-1), eye witness – Bhim Singh (PW-2), Dr.

T. K. Pant (PW-3) who conducted the autopsy and Investigating Officer Gopal Datt Weila (PW-4).

7. Bachi Singh (PW-1) is a Gram Pradhan to whom the incident was reported by Bhim Singh – the son of the deceased and the appellant. Bachi Singh reported the matter to the Patti Patwari on the next day of the occurrence. He deposed that he along with Patwari went at the scene of incident and found that the dead body of the deceased lying there. Bhim Singh (PW-2) stated that his father-the appellant has killed his mother – the deceased. PW-1 is also the witness of arrest, recovery and panchayat nama. He proved Ex.ka-2 (memo of arrest), Ex.Ka.3 (recovery memo kerosene jerrican, chauki & Sanasi) and proved the signature in Ex.ka.4 (panchayat nama). PW-2 is the sole eye witness of the incident. He is the eldest son of the appellant and the deceased and he was present at the time of the incident. He was 11 years old and studying in class 4$^{th}$ at the time of incident. PW-2 being of tender age the learned Sessions Judge tested his mental status as to know whether he could give the rational answers or not or he is able to understand the oath and general questions. The learned Sessions Judge was of the view that he was able to understand the questions and had given the rational answers and he was a competent witness to depose the facts on oath. PW-2 identified the appellant in the Court and also stated that the deceased-Smt. Bhagwati Devi was his mother and he had two sisters namely Manju & Deepa and one brother namely Arjun Singh who were younger to him. When PW-2 returned his home from temple at 3 PM on 16.4.2002 his mother was cleaning utensils and at that time his father came there in a drunken state and started beating his mother by a wooden stick resulting which the deceased sustained injuries. Her mother was crying that her hand has been broken and she was also beaten by his father. Thereafter, his father left the house and went to village. His father again came to his house between 8 to 9 PM from the village in drunken state and belaboured his mother by *Chauka* and then strangulated her by *Sanasi* thereby she died. Thereafter his father put his mother on the bed and PW-2 also retired to bed. When PW-2 woke up in the night, he found himself soaked with

with kerosene. He saw his father pouring the kerosene oil on his mother from the plastic jerrican and then pulled out a match box from the pocket and ignited his mother and thereafter his father cried and said that his wife has committed suicide by setting fire to herself. As soon as the appellant started crying, Pratap, Bachi Singh, Sher Singh, Rajendra Singh etc. came at the spot and by that time his wife was already dead. PW-2 further testified that villagers who came at the spot as indicated above extinguished the fire by throwing water on his mother's body and then Sher Singh tied his father by a rope. PW-2 identified the *Sanasi* which was used for strangulation of her mother and the witness also proved the recovery of Sanasi, Chauka & burnt jerrican of kerosene oil (Exts.1, 2 & 3).

8. Dr. T. K. Pant (PW-3) is the Medical Officer, who conducted the postmortem of the dead body of deceased on 18.2.2002. The Medical Officer found that rigor mortis had passed and the entire body was charred except palm and nails and there was no redness between charred part and skin. No vesiculation was present. The Medical Officer was of the view that the deceased died due to strangulation and it has also been stated in the medical report that hyoid bone and thyroid cartilage were found fractured. Cause of death has been given as Asphyxia as a result of strangulation. In the opinion of Medical Officer, the deceased might have died on 16.4.2002 between 8:00 to 8:30 PM. It was also stated that the burn injuries were not ante-mortem and death was not caused due to burn injuries.

9. PW-4 is the Investigating Officer who proved the FIR (Ex.Ka.6) and he also prepared the site plan (Ex.ka.7). He recorded the statement of the witnesses and prepared arrest memo, recovery memo and other documents relating to the investigation. He further alleged that he had sent the dead body of the deceased to the Chief Medical Officer, Almora for postmortem vide letter Ex.Ka.8 and thereafter he submitted the chargesheet.

10. The prosecution also re-examined the PW-1 on 21.4.2003 after modification of the charge. He stated that he was at Almora on the date of the incident and he was informed on telephone that the appellant has killed his wife-Smt. Bhagwati Devi at about 8:30 PM on 16.4.2002 and that he recorded the time of the incident in his report as 11:30 PM instead of 8:30 PM because he had received the information at about 11:30 PM.

11. It has been stated by the accused-appellant under section 313 Cr.P.C. that during day time, he was in the shop of Bachi Singh (PW-1) and when he returned to his house in the night, he found his wife burnt and dead. He also stated that he has been falsely implicated on account of enmity with Rajindra Singh. The recovery of Sanasi, Chauka and burnt jerrican of kerosene oil (Exts.1, 2 & 3) were made in his presence and recovery memo was drawn by the I.O. Panchayat Nama was drawn in his presence. He further stated that witnesses are deposing against him due to enmity but the appellant did not examine any witnesses in his defence.

12. The learned Sessions Judge has held that the PW-2 – a child witness who was able to understand the questions and was able to give the rational answers is a competent witness to depose the facts on oath. He was at his home at the time of incident and narrated the incident in his statement without being influenced from outside source whatsoever and therefore the learned Sessions Judge relied upon the testimony of PW-2. It was further held by the learned Sessions Judge that the testimony of PW-2 is corroborated from the medical evidence. Dr. T.K.Pant (PW -3), who conducted autopsy, corroborated the time of death and the cause of death. PW-3 has also corroborated that the death was caused due to strangulation. The learned Sessions Judge further held that the prosecution has proved the case under section 302 and convicted the accused under section 302 I.P.C. After giving the opportunity of hearing to the accused-appellant on the point of sentence, the learned Sessions Judge has held that the killing of the deceased by the husband inside the house by strangulating in a crude way by using a cooking tool viz. *Sanasi* in presence of the minor children and after causing the death of the wife

pouring kerosene oil and attempting to burn the dead body was such a barbaric act, which had definitely shaken the peace in the society. There being not an ordinary murder, the learned Sessions Judge was of the opinion that the act of the accused comes within the purview of “rarest among the rare gruesome murder”. Due to such type of murder, the appellant was sentenced to death.

13. The appeal having been preferred by the accused-appellant from jail, the court has appointed Sri S. P. S. Panwar, Advocate as Amicus Curiae for the appellant. We have heard him as well as learned A.G.A. on behalf of the State and we have also gone through the evidence and material on record.

**SUBMISSIONS**

14. (i) The learned Amicus Curiae appointed by the Court for the appellant has contended that the prosecution has failed to prove the guilt of the accused-appellant. He further contented that the testimony of PW-2 not being reliable the learned Sessions Judge has committed a manifest error by holding that the testimony of PW-2 is credible and thereby charge has been proved beyond reasonable doubt.

(ii) The learned Amicus Curiae has also contended that even if the trial court came to the conclusion that the death of the deceased has been proved to be homicidal, the conviction under section 302 was not maintainable. He has thus contented that the manner in which the murder was committed fall within the exception 4 of Section 300, the culpable homicide not amounting to murder as it was committed without premeditation in a sudden house hold quarrel in the heat of passion and without the offender having taken undue advantage or acted in an unusually cruel manner. The learned Amicus Curiae has also contented that offence is culpable homicide not amounting to murder.

(iii) The learned Amicus Curiae has further contended that even if the finding of the Sessions Judge is upheld the quantum of sentence (death sentence) is not appropriate. This case does not fall in the category of rarest of the rare cases in which the death sentence is the only appropriate sentence.

(iv) The learned Amicus Curiae has also contended that the PW-2 is not a competent witness under Section 118 of the Indian Evidence Act. The learned Sessions Judge has erred in relying upon the testimony of PW -2.

15. The learned A.G.A. refuted the contentions of the learned Amicus Curiae and further contended that the prosecution has proved the case against the appellant beyond reasonable doubt and the judgment and order of the learned Sessions Judge is liable to be upheld.

**Findings on Submissions No. (i) & (iv)**

16. At the outset, we would like to mention that it is not disputed that the appellant and the deceased were husband and wife and they were living together in the house where the incident took place and it is also not disputed that Bhim Singh (PW-2) is the eldest son of the deceased and he was aged about 11 years at the time of the occurrence. There is only one eye-witness i.e. Bhim Singh and he has categorically stated that his brother and sisters were in their house in the night of occurrence. PW-2 was criticized by the learned Amicus Curiae on the ground that he was not present in his house on the date of occurrence because he was sleeping in the house of one Debuli Devi. The learned Amicus Curiae has relied upon the statement of Bachi Singh (PW-1) who has stated that Bhim Singh alongwith his brother and sisters was sleeping in the house of Debuli Devi at the time of incident. PW-1 further deposed in his evidence that PW-2 stated before the Patwari (I.O./PW-4) under Section 161 Cr.P.C. that Bhim Singh (PW-2), his brother and sisters were sleeping in the house of Debuli Devi on the date of incident. The I.O. had denied that Bhim Singh had given such a statement to him. This statement of PW-1 came only after he was recalled on 21.4.2003 after modification of charge

at the behest of the defence. PW-2 was examined by the I.O. under Section 161 Cr.P.C. on the next day of the incident. Bachi Singh-informant was produced by the prosecution as PW1 at the first instance on 5.10.2002 and he never made such statement before the court below. The defence had not given any suggestion to PW-1 to the effect that Bhim Singh (PW-2) alongwith his brother and sisters were sleeping in the house of Debuli Devi on the date of incident. As such this isolated statement cannot be of any avail to the defence. This apart, it is not disputed that the deceased was the mother and appellant is the father of Bhim Singh (PW-2). The appellant and the deceased were living together in their house where the incident took place. It is natural that the children of tender age would always be in the same house where the parents were residing. There is no reason why the minor children will go to sleep in the house of a neighbour Debuli Devi. The natural presumption would be that PW-2 was sleeping in his house with his parents and that he gave the correct version of the incidents. Moreover, no minor son who has lost his mother in the incident would falsely implicate his father so as to loose him also. We are of the opinion that the testimony of PW-2 is fairly reliable on the factum of incident.

17. It was contended by the Amicus Curiae that the PW-2 was of tender age at the time of the occurrence and he was not competent to depose the incident. Admittedly, the PW-2 aged about 11 years was studying in class-IV at the time of the occurrence. The learned Sessions Judge has examined the witness as to whether the PW-2 is competent to give the evidence or not and also examined his mental status with regard to the capability of understanding the oath and thereby put certain questions to him. The learned Sessions Judge was satisfied that he is competent to give the evidence. The learned Sessions Judge held that he was capable to understand the impact of the evidence and capable to know the questions and the consequence thereof. As such the contention of the learned Amicus Curiae has no force.

18. The learned Amicus Curiae has contended that Bhim Singh (PW-2) was witness of tender age of 11 years at the time of the occurrence and he was tutored by the Government counsel as well as by his uncle Rajendra Singh to depose against his father. Rajendra Singh is not the witness in this case. The defence has not put any suggestion during the cross-examination to elicit any enmity with Rajendra Singh or any reason of influence so that PW-2 may give evidence against the appellant. There is neither any circumstances nor any probability in the case as may show that PW-2 is a tutored witness.

19. It was contended by the Amicus Curiae that independent witnesses were not produced in the case and the total prosecution story is liable to be disbelieved. The learned A.G.A. for the State refuted the contention. The PW-2 has stated in his statement that when the body of the deceased was set to fire, the appellant started crying “Bachao-Bachao”, whereupon Pratap Singh, Bachi Singh, Sher Singh and Rajendra Singh etc. of the village assembled there and it was found that the victim was already dead. Learned Amicus Curiae argued that these witnesses were not produced before the Court by the prosecution. We are of the opinion that there was no need to produce these witnesses because it was not disputed that the fire was ignited to the body of the deceased. It was only disputed as to whether the burn injuries were post-mortem or ante-mortem. It was further contended by the Amicus Curiae that the younger brother and sisters of the eye witness PW-2 were also not produced by the prosecution as witnesses. It is well settled principle of law that there is no need to multiple the evidence on the same point.

20. The learned Amicus Curiae further contended that the PW-2 has stated that when he woke up, he found himself soaked with the kerosene oil and his father (appellant) was pouring kerosene oil on his mother. It was submitted by the learned Amicus Curiae that the I.O. did not seize kerosene oil soaked cloth of the PW-2. The omission did not raise any doubt in the prosecution case because it is established that the deceased was set to fire after she was already dead.

21. The learned Amicus Curiae pointed out certain minor/immaterial contradictions found in the statement of the PW-1 and contended that the case against the appellant stand falsified. The minor contradictions in the evidence of witnesses are of no avail when the witnesses have narrated the natural story before the court below. It is quite natural that the persons narrate the story in different ways and in different words at different times. Therefore, in such circumstances the minor contradictions are bound to creep in the testimony of natural and reliable witnesses.

22. The PW-2 is the sole eye-witness of the case and he had categorically given the details as to how his mother was killed by his father and he also narrated the whole story how the incident took place. The witness was cross-examined at length but there was no cross-examination on the point of incident and as such the testimony of PW-2 was unrebutted on the point of incident and cause of death. In view of the above, we are in agreement with the finding of the Sessions Judge that PW-2 was a natural and reliable witness and he had not given any tutored evidence. As had been stated earlier the statement of PW-2 was sufficient to convict the accused-appellant without corroboration although there is sufficient evidence to corroborate the evidence of PW-2. According to the opinion of the doctor (PW-3), the deceased died due to strangulation between 8:00 and 8:30 PM on 16.4.2002. PW-3 had categorically denied in his statement that the deceased might have died due to burn injuries. In view of the evidence of PW-3 and condition of the body of the deceased as indicated the burn injuries were not ante-mortem.

23. PW-2 has clearly stated that the deceased was strangulated by *Sanasi* and medical evidence also support the version that the death was caused due to strangulation and the report also reveal that the hyoid bone and thyroid cartilage were found fractured. As such the evidence of PW-3 and postmortem report (Ex.Ka.5) fully corroborate the evidence of PW-2. It is not disputed that the deceased died in the house of the appellant and dead body was recovered where the incident took place. The I.O. had arrested the appellant and recovered *Sanasi, Chauka* & burnt jerrican of

kerosene oil from the place of incident near the dead body. The recovery memo (Ex.Ka.3) was prepared at the spot. The circumstances clearly reveal that the deceased was strangulated by *Sanasi* by the accused as stated by PW-2.

24. It is well settled law that a child witness if found competent to depose to the facts then the reliable evidence of such a witness could be made the basis for convicting the guilty. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the Court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored. There is no rule of practice that in every case the evidence of such a witness be corroborated before a conviction can be allowed to stand but, as a rule of prudence the Court always finds it desirable to have the corroboration to such evidence from other dependable evidence on record. This principle has been enunciated in Dattu Ramarao Sakhare Vs. State of Maharashtra {reported in 1997 SCC (Cri.) 685}.

25. It has been held in Shishan Vs. State of Rajasthan SCC(Cri) 2000 Vol-II page 1236:-

> *"The learned Sessions Judge relying upon the evidence of PW4, who was 11 years old on the date of occurrence, came to the conclusion that his evidence can be solely relied upon to bring home the charge and ultimately convicted the appellant under Section 302. The High Court also relied upon the same evidence, took into consideration the arguments advanced on behalf of the accused that the evidence of PW4, who is a child witness, cannot be accepted without independent corroboration but rejected the same. In*

*this Court, the sole argument advanced by the learned counsel for the appellant is that PW4, being a child witness, the courts below could not have relied upon the same to base the conviction of the offence under Section 302. We have been taken through the evidence of the said PW4 and we do not find any substance in the aforesaid arguments. PW4 has given a picture of the entire occurrence and the fact that PW4 came and immediately narrated the same to his father and the father thereafter went to the place of occurrence and brought his wife to his house and then gave the report at the police station and the said report fully depicts the entire incident, indicates that the child PW4 has truthfully stated as to what he saw. So far as the capacity of the child to depose is concerned, not only the learned Sessions Judge before recording his evidence took the precaution of examining and finding out his capacity to depose, but the very deposition itself on a scrutiny would indicate that though he was 11 years old, yet had sufficient maturity to depose as to what he saw and we see nothing brought out in the cross-examination to have an iota of doubt about his capacity to depose. While placing the evidence of PW 4 nothing has been brought to our notice in the cross-examination to impeach his testimony. In that view of the matter, we see no infirmity in that evidence being taken as the basis of conviction both by the learned Sessions Judge as well as by the High Court. As stated earlier, the fact that the medical evidence also indicates two injuries, one on the head and the other on the neck corroborates the oral evidence of PW4."*

26. It has been held in the State of Karnataka Vs. Shariff SCC (Cri) 2003 page 567:-

*"In our opinion the view taken by the learned Sessions Judge that it would be unsafe to rely upon the testimony of*

*PW3 regarding the actual factum of incident is not correct. A boy aged 8/9 years would be near his mother and would be sleeping in the same house where she was sleeping. There was no occasion for him to go to the house of Jaina Bi and to sleep with her. If PW3 was not present in the house and was in the house of his grandmother on the night in question, he could not have conveyed the information about the incident forthwith. If PW3 was present in the house he was bound to witness the incident, namely, picking up of quarrel by the accused with his wife and setting her on fire. There was absolutely no reason why PW3 would give a false statement against his own father that he had tied the hands and legs of his mother and had burnt her. We are of the opinion that the testimony of the PW3 is fairly reliable on the factum of the incident and the same cannot be discarded only on account of a stray sentence in his cross-examination where he has stated that when his mother caught fire he was in his grandmother's house. The High Court did not examine the testimony of this witness carefully and we find ourselves unable to agree with the view taken by it."*

27. The learned Amicus Curiae has contended that there was inordinate delay in lodging of the FIR. Perusal of the FIR reveal that the Patwari was not available at the headquarter as he was in Almora in connection with a meeting. This fact had also been incorporated in the FIR itself. The FIR (Ex.ka.6) also reveal that the Patwari's headquarter was three kilometer from the place of incident. The incident took place in the night hours and it was also to be kept in mind that the place of incident falls in the hill area and there was no good means of transport and communications. In these circumstances if report was lodged the next day, it could not be said that the report was lodged by inordinate delay. As such there is no delay on the part of the prosecution. In view of the foregoing discussion, we are of the view that the prosecution has proved

beyond reasonable doubt that the appellant was the author of the fatal injury of the deceased.

**Findings on Submission No. (ii)**

28. The learned Amicus Curiae has contended that the instant cases falls under exception IV of Section 300 because the offence was committed without any pre-meditation in a heat of passion and therefore the offence was under Section 304 IPC and not under Section 302 IPC. The learned A.G.A. for the State refuted the contention of the learned Amicus Curiae. To appreciate the contention of the parties, it is necessary to go through the evidence and circumstances of the case. From perusal of the record, it is revealed that when PW-2 returned to his home from temple at 3 PM on 16.4.2002 his mother was cleaning utensils. His father came there in a drunken state and started beating his mother by a wooden stick resulting which the deceased sustained injuries. Thereafter, his father left the house and went to village. His father again came to his house between 8 and 9 PM from the village in drunken state and started assaulting the deceased by *Chauka* and then strangulated her by *Sanasi*. Consequently, she died. Thereafter, his father put his mother on the bed and asked him to go to sleep and then his father poured the kerosene oil on his mother from a jerrican and then took out a match box from his pocket and ignited his mother and thereafter his father went out of the house and started crying *"Bachao-Bachao"*. The evidence and circumstances reveal that the appellant had made up his mind to kill the deceased right in the day time itself when he gave her beating. The appellant strangulated the deceased by Sanasi without any provocation on his return to house from the village. The conduct of the accused prior to causing the death of the deceased and after the death clearly reveal that it was the result of pre-meditation. We are, therefore, of the view that the appellant was not entitled to get the benefit of exception IV of Section 300.

29. The learned Amicus Curiae drew attention to the Section 304 of the Cr.P.C. which provides that in a trial where the accused is not represented by the counsel the Court shall appoint a pleader for the accused at the cost

of the State. The learned Amicus Curiae submitted that the accused has not been provided services of an experienced lawyer as his Amicus Curiae to defend his case. The learned A.G.A. has refuted the contention of the Amicus Curiae. The record reveal that that the appellant engaged two advocates to defend him and he had never requested to appoint any lawyer as Amicus Curiae. The court could only provide legal assistance as provided under Section 304 Cr.P.C. where the accused is not represented by the counsel. If the accused engage his own counsel to defend his case, there is no need to provide the Amicus Curiae. He never placed any request before the court below and in case, he would have placed the request before the court then the contention of the Amicus Curiae may have some favourable consequences to the appellant. It was therefore to be taken that the case of the appellant was defended by the counsel on his instructions.

**Findings on Submission No. (iii)**

30. It has to be considered as to whether the case falls in the category of the “rarest of the rare cases” calling for the extreme penalty of death. No doubt, the murder committed by appellant was brutal in nature. However, the shocking nature of the crime should not induce an instinctive reactions as regards the consideration of quantum of punishment. The entire set of attending circumstances have to be taken note of to come to a judicial finding as to what punishment should be awarded to the offender with regard to this aspect of the matter that it was preplanned act of the accused-appellant. It is well settled principle of law that the Court must pay due attention both to the crime and criminal in awarding the death sentence. The due weight to be given to the aggravating and mitigating factors depends upon the facts and circumstances of a particular case.

31. Brutality is inbuilt in every murder and mitigating factors is to be seen in all cases.

32. The Supreme Court in the background of these factors indicated in Bachan Singh case {reported in 1993 (3) SCC 670} formulated the following propositions for application to the facts of each case for determination of the question:-

(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.

(ii) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'.

(iii) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment of life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

(iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

(39). In order to apply these guidelines inter alia the following questions may be asked and answered:

(a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?

(b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?

33. The principle laid down in Bachan Singh case and the formulations made in Machhi Singh case {reported in 1996 (6) SCC 250} as noted earlier have been applied by the Supreme Court in different cases depending on the facts and circumstances thereof. In the case of Nirmal Singh Vs. State of Haryana {reported in 8 SCC (3) SCC p/650} the Supreme Court while confirming the death sentence imposed on accused Dharam Pal, commuted such sentence to life imprisonment of the co-accused taking note of the facts that the accused had no criminal antecedents, no possibility of continued threat to society, he was only accompanying his brother co-accused and gave three blows to one deceased only after his brother had given 2-3 blows to the deceased. No assault was carried out by him on other victims who were killed by his brother. The Supreme Court in the above case held that the case is not of "rarest of rare" nature and hence commuted death sentence to life imprisonment.

34. It has been held in Anshad Vs. State of Karnataka 1994 4 SCC p/381:-

> *"The courts must be alive to the legislative changes introduced in 1973 through Section 354(3) Cr.P.C. Death sentence, being an exception to the general rule, should be awarded in the 'rarest of the rare cases' for 'special reasons' to be recorded after balancing the aggravating and the mitigating circumstances, in the facts and circumstances of a given case. The number of persons murdered is a consideration but that is not the only consideration for imposing death penalty unless the case falls in the category of 'rarest of the rare cases'. The courts must keep in view the nature of the crime, the brutality with which it was executed, the antecedents of the criminal, the weapons used etc. It is neither possible nor desirable to catalogue all such factors and they depend upon cases to case."*

35. After elaborate discussion of the law laid down earlier by the Supreme Court in Mohd. Chaman Vs. State (NCT Delhi) 2001 2 SCC (Cri) p/28 held that :

> *"Coming to the case in hand, the crime committed is undoubtedly serious and heinous and the conduct of the appellant is reprehensible. It reveals a dirty and perverted mind of a human being who has no control over his carnal desires. Then the question is : Whether the case can be classified as of a "rarest of rare" category justifying the severest punishment of death. Treating the case on the touchstone of the guidelines laid down in Bachan Singh, Macci Singh and other decisions and balancing the aggravating and mitigating circumstances emerging from the evidence on record, we are not persuaded to accept that the case can be appropriately called one of the "rarest of rare cases" deserving death penalty."*

36. The death of the deceased was caused by strangulation by *Sanasi.* The medical evidence reveal that hyoid bone and thyroid cartilage were found fractured. This shows that the deceased would have died immediately after the aforesaid fracture. There is no evidence that the appellant is such a dangerous person that to spare his life will endanger the society or community. After the murder of the deceased there are four minor children in his family. In case appellant is also deprived of his life there will alone be the minor children in the family. Keeping in view the nature of the crime, the manner in which it was executed the antecedent of the appellant and the weapon used, we find it difficult to uphold the capital punishment awarded by the Sessions Judge. We are also not satisfied that the circumstances of the crime are such that there is no alternative but to impose the death sentence even after according maximum weightage to the mitigating circumstances in favour of the offender. We are of the opinion that this is not the rarest of rare case calling the extreme penalty of death for the murder committed by the appellant. We are of the considered opinion that the case is one in which

a humanist approach should be taken in the matter of awarding the punishment.

**ORDER**

37. In view of the aforesaid reasons, we dismiss the appeal in so far as the conviction of the accused/appellant Dungar Singh under Section 302 is concerned. We, however, modify the sentence passed against him as under:-

38. The conviction of the appellant under Section 302 as recorded per judgment and order dated 22.11.2003 is affirmed. The sentence of death is, however, modified to the sentence of life imprisonment. Accused-appellant Dungar Singh shall undergo rigorous imprisonment for life under Section 302 IPC. He is in jail. He will serve out the sentence as awarded to him.

39. Criminal Reference No. 2/2003 made by the learned Sessions Judge is hereby rejected.

40. Let the copy of the judgment alongwith record of the case be immediately sent back to the court concerned for needful compliance under intimation to this Court within two months positively.

**(J. C. S. Rawat, J.)** **(Irshad Hussain, J.)**

**(Rawat)**